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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

<p>In the Matter of the Complaint of</p> <p>BEAVER COUNTY, et al.</p> <p>Complainants,</p> <p>vs.</p> <p>QWEST CORPORATION fka U S WEST COMMUNICATIONS, INC., fka MOUNTAIN STATES TELEPHONE & TELEGRAPH SERVICES, INC.</p> <p>Respondent.</p>	<p>Docket No. 01-049-75</p> <p>QWEST'S RESPONSE TO COUNTIES' MOTION FOR MODIFICATION OF SCHEDULING ORDER</p>
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Qwest Corporation ("Qwest"), pursuant to Utah Admin. Code R746-100-4.D,
hereby responds to Complainants' Motion for Modification of Scheduling Order
("Motion") filed by Beaver County, et al. ("Counties") dated August 31, 2004. Qwest

opposes the motion.

I. BACKGROUND

The Counties filed their complaint in this matter on September 17, 2001, and their amended complaint on July 19, 2002. The Counties seek a refund to customers of \$16.9 million in property taxes which were refunded by the Counties to Qwest in settlement of litigation regarding the property tax assessments of Qwest by the Utah State Tax Commission for the years 1988 through 1996. During the entire three-year period since the Counties filed this action, they have done little to prosecute their claims.¹

Faced with this lack of activity, the Commission held a status conference on June 28, 2004 and issued a Scheduling Order on July 6, 2004, providing that “[o]n or before August 31st, 2004, all parties shall complete their discovery on all issues which they intend to present to the Commission for resolution in this docket.”² The Scheduling Order further provided that “[o]n or before September 30, 2004, all parties shall file their pre-hearing motions with the Commission, or provide notice to the Commission and other parties that they seek Commission consideration of motions previously filed with the Commission.”

In response to the Scheduling order, on Friday, August 20, 2004, at 4:33 p.m., the

¹ The Counties have served only two sets of data requests on Qwest. Qwest responded to the first set on October 22, 2002 and the second set on November 19, 2003. The Counties also filed responses to Qwest’s motion to dismiss, appeared to argue that motion, amended their complaint following the Commission’s decision to deny the motion without prejudice, and filed a motion to consolidate their complaint with their action for a declaratory ruling filed in 1999. They were passive participants in the effort of Qwest and the Division of Public Utilities to respond to the Commission’s questions regarding the amount of property taxes refunded that were included in Qwest’s rates.

² On July 21, 2004, the Commission issued its Modified Scheduling Order on Qwest’s Motion for Modification of Scheduling Order, limiting the discovery cutoff previously established to the Counties.

Counties faxed their Notice of Rule 30(b)(6) Deposition of Respondent Qwest Corporation (“Notice”) to counsel for Qwest, setting the Rule 30(b)(6) deposition of Qwest for August 30, 2004, in Salt Lake City, Utah. Qwest agreed on short notice to produce its two employees most knowledgeable about the matters identified in the Notice, neither of whom resides in Utah, each for a maximum of one seven-hour day prior to the discovery cutoff, if the questions were limited to matters relevant to this proceeding. After the Counties informed Qwest that they were not willing to comply with these conditions, the parties agreed that the depositions should not take place as noticed, subject to the Commission resolving disputes between the parties regarding this last minute attempt at discovery. On August 27, 2004, Qwest filed a motion requesting that the Commission issue a protective order not allowing the Counties to take the deposition. Alternatively, Qwest’s motion requested that the Commission issue a protective order limiting the scope of the deposition and providing that the deposition be held at a time or times and location or locations mutually acceptable or that any dispute regarding the same be resolved by the Commission.

On August 31, 2004, the Counties’ filed the Motion requesting that the schedule be extended to allow them to take the deposition following a decision by the Commission on Qwest’s motion for protective order and to allow time for the filing of pre-hearing motions following the deposition. Qwest opposes the Motion because the Counties have inexcusably delayed discovery and would now delay further proceedings to resolve the issues in this matter. The Counties’ failure to timely prosecute their claims through discovery or otherwise should not be a basis for delaying resolution of this matter.

II. ARGUMENT

A. THE COUNTIES MUST SUFFER THE CONSEQUENCES OF THEIR FAILURE TO PROSECUTE THEIR CLAIM.

The Counties waited until well past the eleventh hour to serve the Notice. Even assuming contrary to fact that their earlier efforts at discovery were timely and that they needed the responses to their data requests prior to taking the deposition, they had from November of 2003 until June of 2004 to serve the Notice before any discovery cutoff was pending. Following the status conference on June 28, 2004, they had almost eight weeks to initiate discovery before they served the Notice. Had they prudently served the Notice shortly after the status conference, there would have been ample time for the Commission to resolve the discovery dispute between the parties well in advance of the discovery cutoff. By inexplicably delaying the Notice until barely 11 days before the discovery cutoff, the Counties created the timing problem for which their Motion seeks relief. *Cf. Chadwick v. Nielsen*, 763 P.2d 817, 821 n. 3 (Utah Ct. App. 1988) (“While we agree that discovery is in a sense optional, the failure to conduct discovery is not without consequence.”) (denying motion for leave to amend pleadings that was based in part upon the plaintiff’s own failure to conduct discovery)).

B. THE DISCOVERY CONTEMPLATED IN THE NOTICE IS UNRELATED TO THE PRE-HEARING MOTION THE COUNTIES INTEND TO FILE.

At the status conference on June 28, the Counties stated that they intend to file a motion seeking a ruling that Qwest is judicially estopped from arguing that only a small portion of the \$16.9 million property tax refund was included in rates and, therefore, subject to refund to its customers even if other legal hurdles are overcome. They stated that the basis for their motion is the arguments made and positions taken by Qwest in their prior state court action and the appeal of that matter to the Utah Supreme Court. No

discovery is necessary to develop facts in support of this motion. It would be based on positions publicly taken by Qwest in litigation with the Counties. Furthermore, the Notice is not directed at these issues. It seeks information about Qwest's conduct in property tax proceedings, regulatory filings and proceedings and accounting matters.

The Counties do not need the discovery sought in the Notice to support their proposed pre-hearing motion. Therefore, there is no need to delay the motion cutoff pending resolution of the discovery dispute.

III. CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Commission should deny the Motion. The Counties should be required to live with the consequences of their lack of prosecution of their claims.

RESPECTFULLY SUBMITTED: September 15, 2004.

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-and-

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **QWEST'S
RESPONSE TO COUNTIES' MOTION FOR MODIFICATION OF
SCHEDULING ORDER** was served on the following by electronic mail on September
15, 2004:

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